ORIGINAL

Before the Copyright Royalty Board
Library of Congress
Washington, D.C.

In the Matter of	)	
	)	
Notice and Recordkeeping for	)	Docket No. RM 2005-2
Use of Sound Recordings under	)	
Statutory License	)	

Reply Comments of the Digital Media Association

The Digital Media Association (DiMA), on behalf of its member webcasters, hereby submits its Reply Comments to address three primary issues. First, the relative burdens of notice and recordkeeping should not fall disproportionately on individual webcasters, rather than upon the centralized recordkeeper and clearinghouse, SoundExchange. Second, to promote uniformity in reporting, reduce transcription errors, and thereby enhance the efficiency of the reporting process for the benefit of all parties – those who receive the royalties, those who pay the royalties and SoundExchange – SoundExchange should be required to provide the reporting parties with a database having a unique identifier for each sound recording. Third, as decades of experience have shown, sampling – when properly approached – yields statistically sound representations of census data that result in proper payments to beneficiaries.

1. Reporting Burdens Should Not Fall Disproportionately on Webcasters.

As DiMA noted in its August 26 Comments, Congress made clear its intention that the license should be practical in its implementation and affordable for a multitude of webcasters – and that it should not be available only "in principle" or to just a few. It would defy reason, for example, that Congress would reduce license fees to promote small-scale webcasting yet permit these same webcasters to be overwhelmed by the cost and burden of reporting requirements. The statutory requirement that notice and recordkeeping requirements must be "reasonable" (not "perfect," "exact," or "complete"), and the underlying legislative intent to facilitate licensing for large numbers of webcasters large and small, admonishes that the costs of licensing administration must not impose unreasonable burdens and cost upon the licensees.

DiMA demonstrated in its Comments why the Seventh Circuit's observations in *Amusement and Music Operators Association* v. *Copyright Royalty Tribunal*, 676 F.2d 1144, 1154-55 (7th Cir. 1982), cert. denied, 459 U.S. 907 (1982) provide no meaningful precedent for this case. *See also,* Joint Comments of Radio Broadcasters at 12-13. There is no reasonable comparison between webcasters that invest millions of dollars and program tens of thousands of songs in niche formats, versus jukeboxes that make available at most a few hundred hit singles without any originality in programming.

ATTACHED NOTES

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Spreading the unique voice of webcasting clearly implicates a broader and more compelling public interest under the Section 114 factors than the availability of jukeboxes.

Nothing in the Comments of SoundExchange suggests a contrary result. Rather, the Comments of SoundExchange ignores the principal difference between the questions posed here and in *AMOA,* namely, that the *AMOA* case concerned the amount of the royalty to be paid by the jukebox owner. By contrast, the policy question here is whether administrative costs should determine who may or may not benefit from a statutory license. Administrative costs and burdens should not decide whether a webcaster may or may not make licensed transmissions. Excessive administrative burdens could reduce the number of webcast channels or the size of the audience, and thus would be detrimental to the public interest in the dissemination of performances as contemplated under the statute. It would be ironic if copyright owners and performers lost revenue because fewer webcast entities could afford the statutory license.

Rather, as DiMA observed, the initial notice and recordkeeping proceeding under the Digital Performance Right in Sound Recordings Act, with respect to new cable and satellite digital music services, provides the more relevant precedent. Notice and Recordkeeping for Digital Subscription Transmissions, Interim Regulations, 63 Fed. Reg. 34,289 (June 24, 1998). The Copyright Office in that proceeding held that data reporting requirements should follow those services' existing methods of doing business, and that the regulations should not force the services to assume the added expense and burden that other, more "accurate" methods would impose. Specifically, the Copyright Office rejected the argument that section 114 required the services to identify with 100 percent accuracy the songs that actually were played on those services. Instead, the Office accepted the submission by the services of a list of music that was scheduled to be performed – even though this "intended" playlist included songs that might not have been played at all. As the Office determined, "The regulation requires that the Intended Playlist include every recording scheduled to be transmitted, rather than those scheduled and actually transmitted, because the comments and facilitated discussions established that Services are not able to provide an actual playlist, and that Intended Playlists already include overscheduled recordings (about an extra song per hour) to assure continuity, and are therefore highly reflective of recordings actually transmitted." Thus, even the variations in these intended playlist data of approximately one song per hour (out of approximately 14-15 songs) did not justify the expense to the services of changing their scheduling software or otherwise tracking actual plays.

Consistent with this more pertinent precedent, the notice and recordkeeping regulations for webcasters should follow to the maximum extent possible the current data collection operations of the various existing business models of webcasting services, and employ the least expensive and least burdensome alternatives in the new regulations.

2. **SoundExchange Could Greatly Increase Accuracy and Efficiency, and Reduce Costs to All Parties, by Supplying a Common Sound Recording Data Set with a Sound Recording Identifier.**

DiMA's Comments referred to the long-standing debate as to why SoundExchange continually refuses to supply services with a database of sound recordings, each with a unique identifier. Contrary to standard information industry practices, webcasters and other services effectively have been required to create for the benefit of SoundExchange data concerning the sound recordings themselves. This is an anomaly in the field of data exchange, particularly inasmuch as the Board members and members of SoundExchange create and control absolutely all of the information to be included in this database.

Many such systems have long successfully been used in the medical field. One of the most widely used coding systems was created in 1966 by the American Medical Association, the "Physicians' Current Procedural Terminology" (CPT). CPT lists the descriptive terms and identifying codes for reporting medical services and procedures. This common system of more than 7300 numeric codes provides a uniform language to identify accurately the medical, surgical and diagnostic services provided to patients. Such a common pre-defined numerical system increases the accuracy and reliability of the data and, therefore, the effectiveness and efficiency of nationwide communication among health professionals, patients and third-parties. The American Dental Association relies on similar predetermined numerical coding for dental procedures, known as the Current Dental Terminology (CDT). The American Veterinary Association uses a similar system known as "SNOMED."

Pre-assigned numerical designations also have been used for copyrighted works. Book publishers assign the International Standard Book Number "ISBN" unique identifier to every volume. The RIAA and IFPI more than a decade ago assigned numbers to individual tracks, known as the International Standard Recording Code or "ISRC." Although the ISRC was designed to identify a particular track, like a Social Security number, regardless of on which sound recording it may appear, the existence of the ISRC demonstrates the feasibility of creating such a system for reporting of performances and allocation of performance royalties.

Plainly, adoption of a standard numbering system is warranted. Such a system would virtually eliminate the costs to SoundExchange of cleaning up sound recording data submitted by thousands of services, and the burden, expense, and imprecisions necessarily engendered by manual entry of data, song-by-song, by thousands of individual transmitting entities. SoundExchange could obviate all these problems and expenses by simply assigning numbers to each recording, and making available to the webcasters the data that SoundExchange already has compiled. Indeed, it remains puzzling to DiMA members why, SoundExchange and its members, after so many years of complaining about the need for precise information and the expense of rectifying human error, have not simply solved the problem collaboratively utilizing the information that is in their possession.

3. Sampling is a Statistically Valid and Reasonable Allocation Method, and Should Be Adopted by the Board.

Comments from all webcast services uniformly support the collection and use of sample rather than census data, and for good reason. Allocation of royalties according to sample data is the norm in this field. No performing rights society of which DiMA is aware in the United States or abroad collects 100 percent census data. As Mr. Massarsky certainly is aware from his years of work as an economist to ASCAP, hundreds of millions of dollars per year in the United States alone are distributed according to formulas and techniques based on sample data. The administrative costs and benefits to the collecting societies of using sample data are well known from decades of experience. *Accord* Joint Comments of Radio Broadcasters, at 8.

For most services, supplying data for limited periods of time reduces the burden on the services not just in terms of data collection but also in terms of data accuracy. Less data means fewer data entry errors, less technical clean-up work, and less susceptibility to computer errors during storage and processing that could result in information loss. Moreover, as DiMA noted in its Comments, webcast services may expend the greatest effort in recordkeeping when trying to rectify problems that may affect only a very small segment of data. In such cases, the expense of cleaning up those data records far outweighs the dollar value impact of the errors. It bears reminder in that regard that even mistakes that miscount tens of thousands of performances result in discrepancies of only a few dollars.

SoundExchange's contention that the statute somehow requires census data reporting is not and cannot be a correct statement of law. As noted above, the Copyright Office has approved the use by the pre-existing services of their intended playlists. These data do not reflect what sound recordings actually were performed by the services. Moreover, the inclusion in the intended playlist of one extra song per hour means that some 7-to-8 percent of payments should not have been made and, conversely, that those whose sound recordings actually were performed are being short-changed by that same 7-to-8 percent. So, at minimum, precedent holds that "reasonable" notice and proper payment does not require 100 census and accuracy, as SoundExchange suggests.

Moreover, the criticisms of the use of survey data in the Declaration of Barry Massarsky do not stand up to scrutiny. Of course, in principle, a greater amount of survey data will result in a closer approximation to census data. That, as Mr. Massarsky observes, is "basic math." However, Mr. Massarsky's tests and method fall short in two highly significant ways.

First, it is telling that Mr. Massarsky did not conduct his tests using the survey system that the Copyright Office has proposed in its interim regulations. While his tests covered as much as one continuous week of data, inexplicably Mr. Massarsky did not submit any evidence of the relative accuracy of obtaining two seven-day periods of data per quarter, using either continuous or noncontinuous weeks. Just as Mr. Massarsky's

tests showed dramatic improvement in the representative accuracy of the sample information as between single day or three-day periods and the one-week test, one would expect highly significant statistical improvement in a two-week sample period over a one-week period.

Second, and more importantly, Mr. Massarsky's method measures the accuracy of sample data against the census data of only the same single service. Obviously, data from a single day cannot represent an entire quarter – any service that played exactly the same music every day every quarter would find it extremely challenging to attract and maintain its audience. Good programming practices require some degree of song rotation from a larger catalog over time. Moreover, as a matter of "basic math," it is temporally impossible for a service of any substance to play in a single day every song in its database.

Allocation techniques used by organizations that rely on sample data compensate for the variation in playlists over time by aggregating the survey information for all services. Survey data from hundreds or thousands of services create a sample far more representative of the performances across all services during the relevant period, and is far more likely to include virtually every sound recording performer and record label whose works were performed to a statistically (and, therefore, economically) significant extent. Although, for example, AOL Radio's "world music" channel may submit data from only two weeks of the quarter, Yahoo, MSN Radio, Live 365 and scores of other services also are submitting data for their world music channels from other weeks in that same period, so that potential gaps from one report likely will be filled by reports from other services. With such large aggregated sample data, any discrepancies or omissions of performers or labels from are likely to be statistically insignificant and would result in overpayment or underpayment of insignificant amounts.[1]

Consequently, it is not surprising that Mr. Massarsky found discrepancies between sample data and census data for a single service, or that greater discrepancies occurred in smaller samples. That is the very reason why standard allocation methodologies suggest the use of aggregated sample data from across all services to create a more comprehensive and accurate representation of actual performances.

The Board therefore should not discount the use of sampling based solely on the arbitrarily limited tests performed and methodologies used by Mr. Massarsky. Perhaps the more relevant questions would be, what greater degree of accuracy would be obtained by using sample data of two weeks per quarter as the Copyright Office has suggested;

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[1] Although Mr. Massarsky observes that use of sample data would result in overpayment or underpayment to particular labels or artists, he did not quantify the relative economic significance of these deviations. DiMA also notes that both Mr. Massarsky's analysis and the past test performed by SoundExchange at Exhibit A to Mr. Massarsky's Declaration count as separate sound recordings each of the multiple data entries for that recording having a different spelling. Therefore, data entry errors over the course of a quarter likely would increase the percentage of recordings that SoundExchange asserts are "missed" by their tests, although the rightholders actually would receive compensation based on each of the multiple entries.

and, inasmuch as Mr. Massarsky must have relied extensively on sample data in his prior work as an economist with ASCAP, what complementary techniques would ordinarily be employed by economists to assess and reduce the significance of any discrepancies between census and sample data. Given the long history of the use of sample data to allocate hundreds of millions of dollars in music performance royalty revenue annually, we respectfully submit that the relative accuracy of using sample data is amply justified by the administrative cost savings to the services, to SoundExchange and, ultimately, to the right holders themselves.

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DiMA and its members look forward to participating further in this proceeding. We remain available to address any questions, comments or concerns the Copyright Royalty Board may have.

Respectfully submitted,

Date: September 26, 2005

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